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No. _____

OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

WILLIAM A. APPLING, et al.,
Petitioners,

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, et al.,
Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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June 08, 2004

Counsel for Petitioner

QUESTIONS PRESENTED FOR REVIEW

1 May a federal court of appeals refuse to follow the doctrine of *stare decisis* on the ground that it would be "unfair" to a particular corporate litigant to do so?

2. Where a corporate litigant commits a fraud on the court (obtaining a judgment by falsely claiming to represent a material witness and fabricating positions for that witness), may a federal court of appeals refuse to set aside the judgment on the ground that there was no "miscarriage of justice" and the opposing party could have discovered the fraud?

LIST OF PARTIES TO THE PROCEEDINGS IN THE COURT BELOW

The petitioners (Plaintiffs/Appellants below) are:

William A. Appling, Joseph J. Kelly, Robert Buehler, John Lloyd, Daryl Mitchell, Richard Pyorre, John Weir, Gerard M. Verdi, William R. Sparks, Leonard D. Doctor, Jerry Lee Flanders, Verne Walton Ins., Larry K. Wilson, Michael C. Hartman, Daniel Brumfield, Martin H. Lefton, Douglas H. Perry, Mathew N. Pickett, Jr., Jo Ann Searcy, William R. Cornelison, Marilyn J. Cusimano, Dennis B. Farrell, Andrew W. Gaines, David B. Gordon, Paul Julian, Rosanne Smith, W.F. 'Bill' Burbank, Jr. Insurance Agency, Inc., Jean A. Cormier, Lee Cramer Insurance Agency, Inc., Franklin Dutto, Joan F. Ehler, Raymond C. Gilmore, Allen K. Golden, Richard O. Johnson, Gabriel O. Juarez, Jr., Bob Kennedy Insurance Agency, Inc., Lewis Insurance Agency, Inc., Lykke Insurance Agency, Inc., Robert C. Marshall, Terry L. Mcmanus, Alan L. Perkins, Dale W. Pitney, Jr., Jorge Sotelo Insurance Agency Inc., Anthony E. Vito, Terry D. Walker, Judy E. Weldin-leathers, Thomas A. Wilson, Michelle B. Pierce, aka Michelle B. Yates, Clifford K. Young, William Batchelder, Hooper Insurance Agency, Harold R. Little, Fred Love, Sam I. Mayeda, Jim Moore Insurance Agency, Inc., Michael L. Morgan, the Edward Pierce Insurance Agency, Inc., Dick Juge Insurance Agency, Inc., Paul Quilici, Bill Bernard Insurance Agency, Inc., Jacob Castroll, Reguera Insurance Agency, Inc., Chambers Insurance Agency Inc., Lee P. Saghirian, Tana P. Glockner, aka Tana P. Glockner-shultz, Kenneth E. Carroll; Richard S. Frank Insurance Agency, Inc., Bob Andras Insurance Agency, Inc., Patricia Adkins Insurance Agency, Inc., Joann M. Pergrem, aka Joann M. McWilliams,

The respondents (Defendants/Appellees below) are:

State Farm Mutual Automobile Insurance Company; State Farm Fire and Casualty Company; State Farm Life Insurance Company; State Farm General Insurance Company.

RULE 29 CORPORATE DISCLOSURE STATEMENT

With respect to the 16 petitioners who are incorporated, none has a parent corporation or a publicly held corporation owning any of its stock.

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PETITION FOR WRIT OF CERTIORARI

William A. Appling, et al ("Appling") respectfully petitions for a writ of certiorari to review the decision of a panel of the Ninth Circuit Court of Appeals.

OPINIONS AND ORDERS BELOW

The panel decision for which the writ of certiorari is requested is *William A. Appling, et al. v. State Farm Mutual Auto. Ins. Co., et al.*, 340 F.3d 769 (9th Cir. 2003), contained in the Appendix ("App") App. A at 1a through 33a. The Court of Appeals' decision denying the petition for rehearing is at App. B at 34a through 38a. The District Court decisions which the

panel reviewed are *William A. Appling, et al. v. State Farm Mut. Auto. Ins. Co., et al.*, Docket No. C-97-1569-MJJ (Northern District of California, January 7, 2000) and *William A. Appling, et al. v. State Farm Mut. Auto. Ins. Co., et al.*, Docket No. C-01-3181-MJJ (Northern District of California, February 4, 2002).

BASIS OF JURISDICTION

The panel decision and judgment for which review is sought was entered August 13, 2003.

An order denying the petition for rehearing was entered March 10, 2004.

28 U.S.C. § 1254 confers jurisdiction on this Court to review this decision by writ of certiorari.

COURT RULE INVOLVED

While the inter-circuit controversy over the citation and use of unpublished decisions continues to develop, the Ninth Circuit has adopted Circuit Rule 36-3(a), which provides as follows:

> Unpublished dispositions and orders of this Court are not binding precedent, except when relevant under the doctrine of law of the case, res judicata, and collateral estoppel.

Rule 36-3(a) was adopted for a 30-month period beginning July 1, 2000 and extended for an additional 30-month period beginning January 1, 2003.

STATEMENT OF THE CASE

The *Appling* plaintiffs filed this lawsuit against the State Farm group of insurance companies on April 29, 1997 in the federal district court for the Northern District of California. The basis for federal jurisdiction was 28 U.S.C. § 1332 (diversity of citizenship).

Each plaintiff was an insurance agent who had been operating under a contract to market and sell State Farm insurance products. The lawsuit included claims by many of the plaintiffs that State Farm had unilaterally terminated their contracts without good cause. State Farm maintained that it had the contractual power to terminate the contracts at will.

On May 13, 1999, while this lawsuit was pending in the district court, the Ninth Circuit Court of Appeals entered a nonpublished decision holding that the State Farm contract required good cause for termination. That decision, *Sandberg v. State Farm Mut. Auto. Ins. Co.*, 182 F.3d 927 (9th Cir. 1999) (mem. disposition), *cert. denied*, 528 U.S. 1118 (2000), is cited and discussed at length at various points in the decision for which this petition requests review on certiorari. (See App. A at 5a, 6a, 11a, 12a, 13a, 23a, 24a, 25a, 26a, and 27a.)

Ninth Circuit Rule 36-3(a) makes the *Sandberg* decision a binding precedent when relevant under the doctrine of collateral estoppel. (The rule is quoted on p. 2, *supra*.) Citing the rule and the *Sandberg* decision, the *Appling* plaintiffs whose contracts had been terminated moved in the district court for a

collateral-estoppel based summary judgment that the State Farm contract was at least reasonably susceptible to an interpretation that it could not be terminated without cause, which would allow their termination claims to go to the jury. State Farm cross-moved for a summary judgment that the contract was terminable at will, arguing that the district court should refuse to follow *Sandberg* because it would be "unfair" to State Farm. The district court denied the *Appling* plaintiffs' motion and granted State Farm's cross-motion.

The *Appling* plaintiffs appealed, contending that *Sandberg* was binding precedent in the Ninth Circuit under Circuit Rule 36-3, and the district court could not refuse to follow binding precedent.

While the appeal was pending, the *Appling* plaintiffs learned that, back during the discovery period leading up to the summary judgment phase in the district court, State Farm had fraudulently purported to represent a potential third-party witness, who held information highly material to the termination decision, and had advanced false positions on behalf of that person without his knowledge or consent. Upon learning this, the *Appling* plaintiffs filed an independent action to set aside the district court's decision granting State Farm's cross-motion on the termination issue, on the ground that the decision had been obtained by a fraud on the court. That action, was dismissed by the district court for failure to state a cause of action. The *Appling* plaintiffs appealed, and the two appeals were heard at the same time.

On August 13, 2003, the Ninth Circuit panel assigned to the two actions issued a 2-1 decision affirming the district court on both the collateral estoppel issue and the dismissal of the independent action. (The majority opinion is App. A at 1a-22a. The dissenting opinion is App. A at. 22a-33a.) With respect to the collateral estoppel issue, the majority concedes that the

Sandberg decision is relevant under the doctrine of collateral estoppel, overturning the district judge on that particular issue:

> [T]he district court erred by finding the termination-for-cause decision in *Sandberg* was not necessary to the holding. Contrary to the district court's conclusion, the prerequisite for applying collateral estoppel was met. *See Weems*, 49 F.3d at 532.

(App. A at 13a.) But the majority then refuses to follow Circuit Rule 36-3(a), which makes *Sandberg* a binding precedent when relevant under collateral estoppel. The majority concludes, instead, that it would be "unfair" to State Farm to follow *Sandberg*, essentially because, prior to the *Sandberg* decision, State Farm had managed to obtain earlier decisions over the years from other courts agreeing with its position that the contract was terminable at will. Apart from the legal error in refusing to follow its own precedent, the majority also errs in concluding that *Sandberg* was "contrary" to the earlier decisions.

With respect to the independent action to set aside the termination decision because of the fraud on the Court, the majority reasons that this was not a "miscarriage of justice" which "harms the integrity of the judicial process," characterizing State Farm's faked representation of the potential witness and fabrication of false positions for the witness as simple "non-disclosure" which could have been discovered by "due diligence." (App. A at 23a.)

The Dissent

The dissent concludes that the district court (and the majority) err as a matter of law in not applying collateral

estoppel against State Farm and in dismissing the independent action. With respect to the majority's decision not to follow *Sandberg*, the dissent states:

> The majority holds that collateral estoppel does not bar relitigation in this case of the identical issue that was decided in *Sandberg v. State Farm Mut. Auto. Ins. Co.*, 182 F.2d 927 (9th Cir. 1999) (memorandum disposition). *Sandberg* held that, under California law, the contract provisions that are at issue here permit termination only for good cause. The majority concedes that the district court erred in holding that the preconditions for estoppel were not met in this case, *see* majority opinion, *supra*, but the majority nonetheless defers to the district court's ultimate decision not to estop State Farm from relitigating the issue. The majority errs.

(App. A at 23a.)

> [T]he majority is wrong to defer to the district court's decision in disregarding *Sandberg*. The district court has no such discretion, and we owe the district court's decision on this point no deference. The district court held that our decision in *Sandberg* was sufficiently inconsistent with prior decisions *in other jurisdictions* (not our court) that it would be unfair to estop State Farm from relitigating the scope of the termination clauses at issue. In such circumstances, the lower court's refusal to follow a decision of this circuit is reversible error.

> The question of the consistency of *Sandberg* with prior decisions -- and, hence, in some sense *Sandberg*'s fairness -- was a matter for the panel that decided that case. It is improper to assume that the *Sandberg* panel was unaware of, or disregarded, the state of the law when it issued its disposition. Moreover, State Farm had amply opportunity to challenge the consistency (and fairness) of our decision with prior authority when it petitioned for rehearing by the original panel.

(App. A at 25a.)

> The district court has no special expertise nor license to assess, as a matter of law, whether our decisions are right, wrong, consistent, or inconsistent. That is, quite simply, our task (and that of the Supreme Court). Our decisions, whether memorandum dispositions or opinions, state the law of the circuit and must be followed by a district court in cases where they properly govern the issues presented. *See* Ninth Circuit Rule 36-3. The district court had no authority to disregard our decision.

(App. A at 26a.)

With respect to the majority's opinion that it would be "unfair" to State Farm to follow *Sandberg*, the dissent states:

> The majority's conclusion that *Sandberg* is "inconsistent" with other authority so as to preclude applying collateral estoppel against State Farm is simply wrong. To be inconsistent

in this sense, a decision must conflict with relevant legal authority on the same issue.

This case involves two groups of plaintiffs: (1) those from Arizona, California, Colorado, Iowa, Maryland, Nevada, Utah, and Washington -- states that the district court held follow a rule that permits extrinsic evidence to be used to illuminate the meaning of *unambiguous* contract terms; and (2) those plaintiffs from Florida, Idaho, Kansas, Louisiana, Nebraska, Ohio, and Texas -- states that the district court held permit the introduction of extrinsic evidence if a contract term in *ambiguous*. Neither party has challenged the district court's conclusions in this regard. Accordingly, the only authority that would be relevant in determining that *Sandberg* was "inconsistent" would need to be authority interpreting the rule of law that we applied in *Sandberg* -- that is, authority applying California law, or the law of a state that follows the same rule.

The pre-*Sandberg* authorities that State Farm proffers applied New Hampshire, law, Illinois law, New Mexico law, and Kansas law -- none of which is at issue here (except Kansas). Although State Farm cites three cases from California courts, two are from trial courts, and none of them is California Supreme Court authority. It is wrong to hold, on such a basis, that *Sandberg* is "inconsistent" with the law of California and of the other states that follow the same rule. Nor do any of the authorities that post-date our decision in *Sandberg* indicate that *Sandberg* is inconsistent.

***

> Nothing in *Parklane Hosiery* suggests that the Supreme Court intended to upset the usual channels of appellate review or to grant discretion to district courts to refuse to accord preclusive effect to prior judgments of their circuit courts. Nor does *Parklane Hosiery* suggest that we should defer to an inferior court within our jurisdiction as to the correct legal application of our own decisions. *Parklane Hosiery* involved the question of whether to grant preclusive effect to a decision by the Second Circuit in a case that was before a district court within the same circuit. *See Id.* at 324-25. But the Supreme Court did not reach the actual question presented here of whether a district court may disregard a prior decision by the court of appeals that sits above it on the ground that the circuit's decision conflicts with foreign authority. Although the Court noted that a general exception might be made for decisions that are inconsistent with prior decisions, it held that "none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present." *Id.* at 331.

(App. A at 24a-26a.)

With respect to the independent action to set aside the termination decision based on fraud on the court, the dissent states:

> The gravamen of the plaintiff's complaint in the independent action under Rule 60(b) is that State Farm's counsel, Orrick, Herrington &

Sutcliffe, committed fraud upon the court by responding to the plaintiffs' request to depose Henry Keller, a former State Farm executive, by fraudulently claiming to represent Keller and opposing the disposition on grounds that he was very elderly, had long been retired, and possessed no documents or knowledge concerning the subject matter of the lawsuit. In reliance on Orrick's representations, the plaintiffs claim, Orrick did not represent Keller and knew Keller possessed material evidence that strongly supported their claims and was willing and ready to testify.

The majority holds that Orrick's acts are not actionable because they do not rise to the level of fraud on the court or work a grave miscarriage of justice. I cannot agree. The majority's interpretation as to when a federal court may set aside a judgment is too narrow. Rule 60(b) permits a court, within a reasonable time, not more than one year after a judgment is entered, to grant a motion for relief from a judgment because of, inter alia, fraud on the court. *See* Fed. R. Civ. P. 60(b). After a year elapses, the rule also allows a party to bring an independent action to set aside a judgment for fraud on the court. The power to grant relief in an independent action is based in the court's inherent "power to vacate judgments on proof that a fraud on the court has been committed." *In re Levander*, 180 F.3d 1114, 1118 (9th Cir. 1999) (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43-44 (1991)). Rule 60(b) largely codified preexisting substantive law regarding the circumstances in which courts are

empowered to set aside judgments, but removed many procedural complexities that were associated with preexisting law. *See Averbach v. Rival Mfg. Co.*, 809 F.2d 101, 1020-21 (3rd Cir. 1987) (discussing the relationship of Rule 60(b) to prior law and practice). The period of a year specified by Rule 60(b) supplanted the earlier requirement that a request to set aside a judgment that was brought as part of the original action must have been made before end of the term of the court in which the judgment was entered. However, nothing in the text of Rule 60(b) requires that a plaintiff make a higher showing for relief in an independent action than in a motion under the rule.

The question presented here is whether the fraud that the plaintiffs have alleged may, if proved, warrant relief. Fraud in the discovery process plainly may sustain an independent action under Rule 60(b). The Supreme Court has held that federal courts may set aside judgments, notwithstanding the defense of laches or the plaintiff's lack of diligence in pursuing relief if a judgment has been obtained based on evidence that counsel has "manufactured." *See Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944). The Third Circuit has held that a plaintiff stated a claim for relief in an independent action based on opposing counsel's false and misleading answers to interrogatories. *See Averbach*, 809 F.2d at 1017, 1022-23. None of our precedents warrants a different result. In *Levander*, we stated that "non-disclosure by itself does not constitute fraud on the court" that warrants relief in an independent action under

> Rule 60(b), *Levander*, 180 F.3d at 1119, and that ordinary perjury similarly is not actionable, but we explicitly embraced a definition of fraud on the court that encompasses "fraud perpetrated by officers of the court so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases." *Id.* at 1119 (quoting 7 James W. Moore, et., Moore's Federal Practice ¶ 60.33, at 515 (2nd Ed. 1978)).
>
> Here, Orrick is alleged not merely to have failed to disclose material evidence[1] that under long-established federal law it was obligated to disclose, but also to have claimed to represent a potential witness that it did not represent and intentionally to have misrepresented that person's position in a calculated attempt to obtain a judgment in its client's favor. An attorney in a legal proceeding who fraudulently claims to represent a client whom she or he does not, not only commits a fraud against the parties to the proceeding, but also a fraud on the court. Both the court and the parties are entitled to rely on an attorney's representation that she or he actually represents a client whom he or she claims to represent. A fraudulent misrepresentation about the fact, nature, and scope of an attorney's mandate is not only an ethical breach but a fraud of the highest order that interferes with the machinery of our judicial system. Our adversary system cannot function if attorneys claim to represent individuals that

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1 Keller himself advised Orrick that he had material evidence to furnish to the plaintiffs.

they do not. The majority fails to appreciate the gravity of Orrick's alleged fraud, and errs as a matter of law in holding that an allegation of such fraud may be dismissed for failure to state a claim.

The majority also errs by holding that the plaintiffs could have, with diligence, discovered Orrick's alleged duplicity by insisting on deposing Keller despite Orrick's representations and that the plaintiffs' failure to do so bars their claim. I strongly disagree. First, under *Hazel-Atlas*, the diligence of a party in discovering the alleged basis for setting aside a judgment is not decisive. *See Hazel-Atlas*, 322 U.S. at 246. Moreover, unlike the perjury in *Levander*, Orrick's alleged fraud will not be subject to the rigors of cross-examination in the factfinding process itself: The representation by counsel that he represents a witness and that the witness has no material information is not "testimony" that may be cross-examined. A party is entitled to rely on the representations of adverse counsel regarding such matters.

As a matter of construing the discovery rules, moreover, the principle that the majority embraces, namely that a party may not rely on the plain representations of adverse counsel in the discovery process, is not cynical but unworkable. It requires a party doggedly to pursue discovery notwithstanding opposing counsel's signed certification that such discovery is not warranted, *see* Fed. R. Civ. P. 26(g), on the possible chance that opposing counsel is committing fraud. The failure of the

party seeking discovery to take such action, which itself might violate the discovery rules, by the majority's lights, precludes it from seeking redress if it later discovers that it has been the victim of fraud. I cannot embrace such a view of the law.

Such an interpretation of the discovery rules is not only unconscionable, but flies in the face of the purpose of the rules themselves. As the Rules Advisory Committee has explained, Rule 26 explicitly imposes an affirmative duty "to engage in pretrial discovery in a responsible manner that is consistent with the spirit and purposes of Rules 26 through 37," Fed. R. Civ. P. 26, Advisory Committee Notes, 1983 Amendment, Subdivision (g), and Rule 37(c) permits a district court to sanction a party for making false or misleading discovery disclosures. *See* Fed. R. Civ. P. 37(c). As the Washington Supreme Court has held, the Federal Rules of Civil Procedure explicitly encourage the imposition of sanctions for discovery abuse in part because "a spirit of cooperation and forthrightness during the discovery process is necessary for the proper functioning of modern trials." *Wash. State Physicians Ins. Exch. & Ass'n v. Fissons Corp.*, 858 P.2d 1054, 1077 (Wash. 1993). The court noted that although "[f]air and reasoned resistance to discovery is not sanctionable[,] ... misleading ... responses [are] ... contrary to the purposes of discovery and ... most damaging to the fairness of the litigation process." *Id.* at 1079-80.

> The plaintiffs' allegations, if proved, would be most damaging to the ethical standing and professional reputation of any attorney -- and indeed might have severe collateral consequences such as disbarment.[2] The majority minimizes the gravity of the plaintiffs' charge and invites similar behavior in the future by holding that such a claim may be dismissed for failure to state a claim in an independent action under Rule 60(b). As Judge Schwarzer has persuasively explained: "Misconduct, once tolerated will breed more misconduct and those who might seek relief against abuse will instead resort to its self-defense." William W. Schwarzer, Sanctions Under the New Federal Rule 11 -- A Closer Look, 104 F.R.D. 181, 205. I would reverse the district court and reinstate the action.

(App. A at 28a-33a.)

REASONS FOR GRANTING THE WRIT

As the dissent explains, in detail, the *Sandberg* decision, a binding precedent under Ninth Circuit Rule 36-3(a), is *stare decisis* in this action. In the absence of a decision overruling

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2 The majority does not hold that Orrick and State Farm have not committed the actions as alleged, but merely that the plaintiffs may not seek relief under Rule 60(b). Orrick itself could be well-served by trial of the charges. They must be very disturbing to a reputable firm. If untrue, Orrick should welcome the opportunity to disprove them.

Sandberg from either the Supreme Court or an *en banc* panel of the Ninth Circuit, neither the district court nor a later panel has the discretion to refuse to follow *Sandberg*. *Stare decisis* is a bedrock principle of the judicial system. All circuits recognize and adhere to this fundamental principle, including the Ninth Circuit. See, e.g., *Hart v. Massanari*, 206 F.3d 1155, 1171 (9th Cir. 2001): "Circuit law ... binds all courts within a particular circuit, including the court of appeals itself."

Under Circuit Rule 36-3 the *Sandberg* decision, though unpublished, is "binding precedent" when relevant under the doctrine of collateral estoppel. The majority opinion concedes that *Sandberg* is relevant for purposes of collateral estoppel under *United States v. Weems*, stating that "the prerequisite for applying collateral estoppel was met." (App. A at 13a.)

At that point, as the dissenting opinion explains, "the district court had no discretion to refuse to follow our *Sandberg* decision" and "the majority is wrong to defer to the district court's decision in disregarding *Sandberg*." (App. A at 25a.) This was not an exercise of discretion by the district court. "[T]he lower court's refusal to follow a decision of this circuit is reversible error." (*Id.*)

The majority relies on *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 331 (1979) as support for the district court's decision to refuse to follow *Sandberg* (App. A at 13a) but, as the Dissent explains, "[n]othing in *Parklane Hosiery* suggests that the Supreme Court intended to upset the usual channels of appellate review or to grant discretion to district courts to refuse to accord preclusive effect to prior judgments of their circuit courts. Nor does *Parklane Hosiery* suggest that we should defer to an inferior court within our own jurisdiction as to the correct legal application of our own decisions." (App. A at. 26a.)

The majority's conclusion that it could depart from the *stare decisis* principle on the theory that it would be "unfair" to State Farm is not only a clear legal error (misapplying *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), it is also based on an erroneous assumption that certain prior decisions were actually inconsistent with *Sandberg*.

In concluding that following *Sandberg* would be unfair to State Farm because *Sandberg* is supposedly inconsistent with other decisions, the majority erroneously refers to seven decisions which are *not* inconsistent with *Sandberg*. (*Olander, Peters, Mooney, Gardner, Drum, Melnick,* and *Vitkauskas*.) Each of those was decided under the older "plain meaning" or "textual" rule which *prohibits* the use of extrinsic evidence to interpret an integrated contract that appears to be unambiguous. *Sandberg* applied the very different California rule, a "contextual" rule that *requires* the court to examine the extrinsic evidence, even when the contract appears to be unambiguous. These two rules often produce different results. In the *Olander* case, for example, one of the supposed "inconsistent" decisions, the majority opinion distinguished *Sandberg* as follows:

> [I]n holding that summary judgment was inappropriate on the terminable-at-will issue, the court in *Sandberg* applied California law, which, unlike North Dakota law, permits the consideration of extrinsic evidence on the question of whether a contract is ambiguous.

Olander v. State Farm Mutual Automobile Insurance Co., 317 F.3d 807, 812 (8th Cir. 2003).

Noting that this case involves plaintiffs from several states which follow the "contextual" rule applied in *Sandberg*, the dissent explains that "the only authority that would be

relevant in determining that *Sandberg* was 'inconsistent' would need to be authority interpreting the rule of law that we applied in *Sandberg* -- that is, authority applying California law, or the law of a state that follows the same rule." (App. A at 24a.) "[T]he majority's conclusion that *Sandberg* is 'inconsistent' with other authority so as to preclude applying collateral estoppel against State Farm is simply wrong. To be inconsistent in this sense, a decision must conflict with relevant legal authority on the same issue." (*Id.*)

The majority also improperly assumes (apparently) that *Sandberg* disregarded five earlier decisions. (*Peters, Mooney, Melnick, Vitkauskas, and Scola.*) As the dissent explains, however:

> [T]he question of the consistency of *Sandberg* with prior decisions -- and hence, in some sense *Sandberg's* fairness -- was a matter for the panel that decided that case. It is improper to assume that the *Sandberg* panel was unaware of or disregarded the state of the law when it issued its disposition.

(App. A at 25a)

The majority's decision to affirm the dismissal of the independent action to set aside the judgment because of the fraud on the court is also a clear legal error.

The fraud which gave rise to the independent action is summarized by the dissent as follows:

> Orrick is alleged not merely to have failed to disclose material evidence that under long-established federal law it was obligated to disclose, but also to have claimed to represent a

> potential witness that it did not represent and intentionally to have misrepresented that person's position in a calculated attempt to obtain a judgment in its client's favor. An attorney in a legal proceeding who fraudulently claims to represent a client whom she or he does not, not only commits a fraud against the parties to the proceeding, but also a fraud on the court.
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> ***
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> Our adversary system cannot function if attorneys claim to represent individuals that they do not. The majority fails to appreciate the gravity of Orrick's alleged fraud, and errs as a matter of law in holding that an allegation of such fraud may be dismissed for failure to state a claim.

(App. A at pp. 30a-31a.) The dissent is correct. See, e.g., *Hazel-Atlas Glass Co. v. Hartford Empire Co.*, 322 U.S. 238, 246 (1944) (judgment vacated where litigant falsely attributed article prepared by litigant's attorney to a disinterested third party); *Pumphrey v. K.W. Thompson Tool Co.*, 62 F.3d 1128, 1133 (9th Cir. 1985) (independent action upheld where litigant failed to disclose unfavorable videotape).

The majority affirms a dismissal of this claim on the theory that these actions "did not disrupt the judicial process because the Agents through due diligence could have discovered the non-disclosure." (App. A at 22a.) This is a further legal error, which conflicts with the clear instruction of this Court in *Hazel-Atlas*:

> But even if Hazel did not exercise the highest degree of diligence Hartford's fraud cannot be

> condoned for that reason alone. ... [T]ampering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistently with the good order of society. Surely it cannot be that preservation of the integrity of the judicial process must always wait upon the diligence of litigants. The public welfare demands that the agencies of public justice be not so impotent that they must always be mute and helpless victims of deception and fraud.

Hazel-Atlas at 246. The Ninth Circuit follows *Hazel-Atlas* in this respect. See, e.g., *Pumphrey* at 1133.

CONCLUSION

The Court should allow a writ of certiorari to review the majority's decision, which departs from the fundamental principle of *stare decisis*, sanctions fraud on the court in a manner which damages the integrity of the judicial process, and conflicts directly with this Court's decision in *Hazel-Atlas Glass Co. v. Hartford Empire, Co.* 322 U.S. 238, 246 (1944).

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